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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 579

SOUTHERN RAILWAY COMPANY and THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

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December 1957.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Appellee Cramet Inc. moves pursuant to Rule 16(e) of the revised rules of this Court that the final judgment of the court below be affirmed.

This is an action to set aside a portion of an order of the Interstate Commerce Commission entered in its Docket

No. 31737, *Cramet Inc.* v. *Alabama Great Southern Railroad Company, et al.*, and companion cases, I. & S. Docket No. 6284, *Rutile Ore—Gulf and South Atlantic Ports to Tennessee*, and Docket No. 31677, *Central of Georgia Railway Company* v. *Cincinnati, New Orleans & Texas Pacific Railway Company*. 298 I.C.C. 439. The three-judge district court dismissed the complaint and this is a direct appeal from the final judgment of the court below.

The complaint of appellant assailed only that portion of the Commission's order bearing upon the practice of reciprocal switching. Throughout its jurisdictional statement appellant treats this matter as if it were completely separate and distinct from the rest of the case. The record shows, however, that the reciprocal switching tariff of appellant is ingeniously and inextricably expressed in terms of rates and routes. We therefore submit the following statement of the issues as revealed by the whole record.

STATEMENT

For more than fifty years all of the railroads serving Chattanooga, Tenn., including the appellant, have voluntarily maintained and still maintain generally unrestricted routing on all categories of freight moving to and from the Chattanooga district. In addition, it has been the invariable practice for many years of all railroads serving Chattanooga, including appellant, to provide in their terminal tariffs a switching charge for which they perform the service of switching any freight between the points of interchange with their connections and the site of any industry located on any one such railroad. This charge is absorbed by the connecting line-haul carrier out of the through rate paid by the shipper. This practice, commonly referred to

as reciprocal switching, extends throughout the so-called Chattanooga switching district. (Tr. 17-21; 67-85; 87-90; 100-103; 115-8).

By virtue of these practices, each industry in the district, although physically located on the tracks of only one railroad, enjoys the same service and competitive position as if it were actually reached by the rails of every road serving the district. Shippers at Chattanooga thereby enjoy the privilege of shipping without rate penalty over any one of existing competition routes without regard to whether such route includes the long haul of any particular carrier participating therein. (298 I.C.C. 447).

The plant site of this appellee, Cramet Inc., together with that of Central Soya Company and other industries, is located in the unincorporated community of Boyce, Tenn., lying adjacent to Chattanooga. These industries are served by a switch track of appellant and are less than one mile from its main switching yard at Chattanooga; the switching service involved is much less than that which is performed in connection with other and more distant industries within the switching district. (Exh. 8). The Boyce area generally has been included in the Chattanooga switching district for more than forty years and this fact was made known to appellee by the representatives of appellant and was a controlling factor in the choice of appellee's plant site in 1953. (Tr. 147-68; 179-81; 236-47).

Upon selection of the Boyce site by appellee, and before the construction of its 25 million dollar titanium plant was complete, appellant amended its terminal tariff in respect of switching to and from Boyce industries. (Tr. 24-6). By its terms, the amendment did not purport to cancel existing routes, but affected only the application of

the rates; it expressly maintained the inclusion within the switching limits of industries and locations on the line of appellant at Boyce.[1] The Commission permitted the amendment to take effect, over protest, on June 23, 1954.

When the amended provision of its terminal tariff had taken effect, appellant began immediately to make use of that provision as a foundation for commercially closing the long established and normal, competitive routes of other carriers so far as Boyce alone was concerned. Accordingly, when the plant of Cramet was ready to begin operation

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[1] The new tariff provision of appellant's terminal tariff is set forth in the Appendix to the Commission's report, as follows, 298 I.C.C. 449:

Item 15. Application of Rates to and from Industries and Locations at Boyce, Tenn.

(1) The CNO & TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn., except as provided in paragraph (2) of this item.

(2) (a) Industries and locations on the CNO & TP Ry. Co. at Boyce, Tenn., are included in the Chattanooga, Tenn., switching limits, and the CNO & TP Ry. Co. will switch carload traffic between said industries and locations and points of interchange with connecting lines at Chattanooga, Tenn., only to the extent provided in subparagraphs (b) and (c) of this item.

(b) Where there is an applicable commodity rate or mileage scale rate in effect to or from (as the case may be) Chattanooga, Tenn., and the same commodity rate or mileage scale rate is not in effect via any line or route to or from (as the case may be) Boyce, Tenn., or

(c) When there is an applicable class rate in effect to or from (as the case may be) Chattanooga, Tenn., and the same class rate is not in effect via any line or route to or from (as the case may be) Boyce, Tenn.

and applied for a reasonable line-haul rate for a large movement of imported rutile ore from the southern ports to Boyce, appellant published line-haul rate tariffs restricting such rates to its long-haul routes from the ports. That proposal was suspended by the Commission upon protest in I. & S. Docket 6284, which was one of the combined proceedings involved in this case. (298 I.C.C. 442).

Thereupon, the appellee Central of Georgia complained in Docket 31677 against the attempt of appellant to exclude Central from participation in the routes by refusing to join with it in rates equal to those proposed over appellant's long-haul routes. Cramet complained in Docket 31737 against the failure of all participating carriers to provide lawful rates on rutile ore, and in particular against appellant's entire program of monopolizing the Cramet plant through the combined cancellation of switching charges and restriction of routes in tariffs of line-haul rates. Cramet sought an order requiring the restoration of a complete service of reciprocal switching at Boyce and the maintenance of lawful and reasonable rates on all freight traffic to and from Boyce, such rates to be no higher over any existing route than over any one route; Cramet also sought the prescription of lawful rates on rutile ore and reparation for the unreasonable rates paid on its movement of ore *pendente lite*. (298 I.C.C. 440).

Full hearing was held by the Commission, at which substantial evidence was adduced concerning the reasonableness and effect upon the public interest of reciprocal switching practices, past and present, in the affected area. (Tr. 177-9; 204-6; 217-23; 259-65).

The entire Commission adopted the final order of its Division 2 and underlying recommendation of its hearing examiner. It found that the proposed cancellation of routes in connection with the reduced rates on rutile ore was not shown to be consistent with the public interest and that the refusal of appellant to participate in rates over all existing routes to Boyce the same as those proposed for application over its long-haul route was unjust and unreasonable. It prescribed reasonable rates on rutile ore and required the railroads to pay reparation for the excess charges paid by Cramet on past shipments. Finally, the Commission held that the refusal of appellant to treat Boyce as a point entitled to switching service at a switching charge, and the maintenance of a tariff provision resulting in rates to or from Boyce that were higher when the routing was over competing routes than when it was over the long-haul routes of the defendant was unjust and unreasonable. (Juris. St. App. B-C; Complaint App. D).

ARGUMENT IN SUPPORT OF MOTION

Appellant has appealed only from that portion of the Commission's order which requires the restoration of a complete reciprocal switching service to and from Boyce, the same as throughout the Chattanooga district, and the same as was voluntarily maintained by appellant at Boyce for many years prior to June 1954; such service still is maintained at Boyce depending only on whether a line-haul rate exists to or from Chattanooga which is not in effect to Boyce via the long-haul route of appellant. Appellant urges on this appeal that the order is contrary to the

short-hauling provisions of section 15(4);[2] that it requires compulsory use of appellant's terminals without the req-

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[2] Sec. 15(4) [49 U.S.C., § 15(4)] provides as follows:

In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

nisite findings under section 3(5);[3] and that it is not supported by adequate findings and sufficient evidence. It is submitted that under the circumstances of the case the questions presented are so unsubstantial as not to require further argument.

The short-hauling question

It is submitted that the Commission's order is not contrary to section 15(4) or section 3(5) because it does not establish through routes. *United States* v. *Great North-*

[3] Sec. 3(5) [49 U.S.C. § 3(5)] provides as follows:

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

ern Railway Co., 343 U.S. 562 (1951). *Virginian R. Co. v. United States*, 272 U.S. 658 (1926).

Appellant argues that the effect of reciprocal switching is to deprive it of its haul between Chattanooga and Boyce as an independent carrier receiving a division of the through joint rates and require it to perform the service as an agent of the line-haul carrier for a lower switching charge. (Juris. St. 16). The matter is essentially one of rates and charges, and does not constitute the establishment of routes. Appellant frankly states that "the physical service would be the same between Chattanooga and the Boyce industries" whether under joint rates or reciprocal switching, (Juris. St. 20).

In this situation it is submitted that the matter was settled by this Court in the *Great Northern* case, wherein the court said (343 U.S. 575):

> But the provisions of § 15(4)—the restrictions against short hauling, the financial needs prohibition and the emergency route provision—all deal with the Commission's power to establish through routes • • • where, as here, the Commission did not establish through routes, § 15(4) has no application.

Even though the physical service remains the same, appellant appears to argue that the Commission is bound by 15(4) when it deals with the reciprocal switching provisions of appellant's terminal tariff because those provisions took effect without suspension. It is not clear whether appellant proceeds on the theory that the effect of its new tariff provision was to cancel routes or close its terminals. Clearly, however, the tariff does not purport in and of itself to accomplish either result. Instead, it provides that:

> Industries and locations on the CNO & TP Ry. Co. at Boyce, Tenn., are included in the Chattanooga,

> Tenn., switching limits, and the CNO & TP Ry. Co. will switch carload traffic between said industries and locations and points of interchange with connecting lines at Chattanooga, Tenn., only to the extent provided in subparagraphs (b) and (c) of this item.

The condition under which the switching charge will apply, as set forth in subparagraphs (b) and (c) of the tariff provision, is expressed in terms of application of rates; it is made to depend upon the existence of *different* line-haul rates via appellant's route to or from Boyce from the rates to or from Chattanooga. Under that provision, therefore, reciprocal switching is not eliminated, but is made to depend upon the line-haul rates and routes.

It is conceded on both sides that the existing line-haul rates provided in the tariffs of all carriers are generally the same to and from Boyce as to and from Chattanooga. The combined effect of that situation and the precise provisions of appellant's terminal tariff provision would be to render inapplicable the reciprocal switching charge. But that does not mean that reciprocal switching was completely cancelled or that appellant's terminal was irrevocably closed by the amendment in question. For the provision is that the application of the switching charge depends on the condition of the rate tariffs of all carriers, over some of which appellant has control and over some of which it does not. Presumably, appellant intended and intends to make rates over its own routes the same to or from Boyce as any other carrier might provide to or from Chattanooga, so as to avoid reciprocal switching under its amended terminal tariff. However, as to rates from or to any origin or destination that is local to the line of a railroad other than appellant, appellant would not, without the agreement of such other carrier have the power to put into effect a rate between such origin or destination on the one hand, and Boyce on the other hand, equal to the rate that such

other carrier might provide to or from Chattanooga. Absent such agreement (which in view of the dispute among carriers cannot be assumed) the reciprocal switching charge applies by the strict terms of appellant's own tariff. If this reasoning is involved, it is caused by the devious phraseology of appellant's tariff. The legal significance of the facts is that the routes and terminals are open and the Commission was not bound by Section 3(5) or 15(4). It is submitted that a patently adroit tariff should not be held to lend substance to an appeal when the court below, the commission, its division, and the hearing examiner, all pierced the veil of tariff subtleties with unerring expertise.

This court held in the *Virginian Railway* case that the practical closing of routes by virtue of the amount and character of the rates did not effect the power of the Commission to deal with the rates over such routes without complying with the short-hauling requirements. The court there said (272 U.S. 666):

> Through routes to the West were already in existence. And there were through rates by combination. (Citations) The fact that the combination rates were excessive constituted the only obstacle to the movement.

That the Commission was in fact dealing with rates and practices is finally demonstrated by the terms of the assailed order. The third ordering paragraph, which alone is involved in this appeal, as follows (Juris. St. App. C):

> *It is further ordered*, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act and thereafter to maintain and apply to the transportation of carload

traffic requiring switching over the rails of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company from Chattanooga, Tenn., to Boyce, Tenn., or in the reverse direction, switching charges, and provisions relating thereto, that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga.

Adequacy of the findings

It is submitted that the Commission did not establish through routes or require the compulsory use of terminals within the meaning of sections 3 and 15. Instead, it is clear that its order with respect to reciprocal switching was made pursuant to section 15(1) upon the basis of findings under sections 1(4), and 1(6) (49 U.S.C. 1(4), 1(6) and 15(1)).[4]

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[4] Section 1(4), 1(6) and 15(1) provide in pertinent part, as follows:

Sec. 1(4). "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Sec. 1(6). "It is hereby made the duty of all common carriers * * * to establish, observe, and enforce * * * just

Accordingly, the Commission found with respect to reciprocal switching (298 I.C.C. 448):

> In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendants as a line-haul carrier to or from Chattanooga, is unjust and unreasonable.

The foregoing ultimate finding under section 1 was made pursuant to subsidiary findings in the Commission's re-

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(footnote four continued)
and reasonable regulations and practices affecting * * * the facilities for transportation * * * and all other matters related to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Sec. 15(1). "That whenever, after full hearing * * * the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever * * * or that any individual or joint classification, regulation, or practice whatsoever of such carrier * * * is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial * * *, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed * * *."

port of which the following is of particular significance in view of the argument made by appellant (298 I.C.C. 447):

> The Southern contends that Cramet will suffer no injury from a restriction of these movements to its single-line routes, since it provides superior service. This would deny to this complainant the benefit of a switching service at a switching charge and deprive it of competitive service to and from Chattanooga. The issue here is similar to that considered in *Agricultural Products Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 I.C.C. 505, wherein division 2 found that the practice of the defendant Southern Pacific Company in refusing to place within the Phoenix, Ariz., switching district tracks served by that defendant in the vicinity of Tovrea, Ariz., was unjust, unreasonable, and unduly prejudicial and preferential.

The appellant quotes a portion of the foregoing finding and states that "The finding has reference to proposed rutile-ore rates restricted to apply over 'single-line routes' of the Southern System". (Juris. St. 17). Appellant, we submit, misconstrues the finding, and it is clear from a reading of the entire finding that the Commission was not dealing merely with routes on rutile ore, but with the effect of reciprocal switching.

In this connection, appellant seeks to distinguish the *Agricultural Products* case cited by the Commission, on the ground that in that case the Commission made an undue prejudice finding under section 3 as well as under section 1 (Juris. St. 20). However, in *Agricultural Products* the Commission was requiring the enlargement of a switching district and the inclusion of tracks that had not theretofore been included by voluntary action of the carrier, for which a section 3 finding may be requisite. *Pennsylvania Co.* v. *United States*, 236 U.S. 351 (1915). In the case at bar, the Commission was not establishing reciprocal switching, but

was prescribing a reasonable provision with respect thereto. It is clear from the provisions of section 15(1) quoted above that the requisite findings in such a case may be either under section 1 or section 3 and not necessarily both. That section confers authority over any carrier action which "is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial".

CONCLUSION

Throughout the proceeding before the Commission, appellant urged that separate consideration must be given to the matters of switching rates, routes, and line-haul rates on rutile ore. In its petition for reconsideration and reargument before the entire Commission of the final report of Division 2, it insisted:

> "If the issue of the proposed restricted routes on rutile are disregarded, it is emphasized that all railroads serving Chattanooga are in a position to publish rates that will apply to Boyce." (page 8)
>
> "Consequently, if the issue of restricted routes is not considered, there is no testimony of evidentiary value in this case on behalf of the intervening railroads in connection with the establishment of reciprocal switching at Boyce." (page 10)
>
> "This Commission has the duty to weigh very carefully the testimony of the witnesses for Cramet and Central Soya on the issue of reciprocal switching only and not in conjunction with their testimony on restricted routes." (page 11)
>
> "Other than on the proposed restricted rate on rutile ore, these industries can ship or receive traffic over any of the lines serving Chattanooga." (page 17)

Appellant has pursued in court the same effort to treat the matter of switching as if it were unrelated to rates and routes, whereas the terms of appellant's terminal tariff are inextricably commingled with the rates and routes. In real purpose and effect therefore, this action and appeal are presented in a manner contrary to section 10(e) of the Administrative Procedure Act [5 U.S.C. 1009(e)], which provides that the court shall review the whole record.

WHEREFORE, appellee submits that the questions submitted on this appeal are so unsubstantial as not to require further argument and that the judgment of the court below should be affirmed.

Respectfully submitted,

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December 1957.

PROOF OF SERVICE

I, Robert N. Burchmore, attorney for appellee Cramet Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of December, 1957, I served copies of the foregoing motion on the other parties hereto, as follows:

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